

RIBARU BINA SDN BHD & ANOR

a

v.

BAKTI KAUSAR DEVELOPMENT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR

b

VINCENT NG J

[SUIT NO: D1-22-822-2002]

21 MAY 2003

CIVIL PROCEDURE: *Summary judgment - Triable issues - Evidence Act 1950, ss. 92, 94 - Rules of the High Court 1980 O. 14*

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The first defendant was awarded a government contract and had appointed one TK Yokohama Construction as its sub-contractor. By a novation agreement, the first plaintiff replaced TK Yokohama and then entered into a joint-venture agreement with the second plaintiff where, in consideration for providing the necessary finance, the second plaintiff was to have lead control in the performance of the works contract. The second defendant who claimed to be the first defendant's holding company and also the main contractor, opened an escrow account directing the bank to credit all payments received under the account directly to the second plaintiff's bank account. The arrangement between the parties was that the second defendant would issue periodical certificates of payments, confirming the amount due and payable upon completion of certain works under the government contract. The defendants failed to pay the amount so certified, thereby terminating the contract. The plaintiffs' application for summary judgment was allowed by the senior assistant registrar, whereupon the defendants appealed.

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Held (allowing the appeal):

[1] The focus of the joint-venture agreement entered into was to facilitate the money arrangements between the plaintiffs. The court would need to know how the defendant could become a party to the contract. (p 715 h-i)

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[2] The question of whether the acts of the second defendant following the joint venture agreement were sufficient to give rise to privity of contract between the plaintiffs and the second defendant is a triable issue that ought to be determined at full trial. This apart, the plaintiffs' non-compliance with the certification requirements had also raised triable issues. (pp 716 b & 718 b-c)

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- a Case(s) referred to:**
Chartered Bank v. Yong Chan [1974] 1 MLJ 157 (**cit**)
Crown House Engineering v. Amec Projects 48 BLR 32 (**fol**)
Gilbert Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd (HL) [1973] 3 All ER 195 (**refd**)
- b**
Gunung Bayu Sdn Bhd v. Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 MLJ 332 (**fol**)
Mahkota Technologies Sdn Bhd v. Bina Jati Sdn Bhd & Anor (D1-22-3190-1998) Unreported (**refd**)
Mahkota Technologies Sdn Bhd v. BS Civil Engineering Sdn Bhd [2000] 7 CLJ 280 (**fol**)
- c**
Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC (**cit**)
UMBC Bhd v. Tan Lian Keng & Ors [1990] 1 MLJ 280 (**cit**)
UMBC v. Palm & Vegetable Oils (M) Sdn Bhd [1983] 1 MLJ 206 (**cit**)
Walton Stores (Interstate) Pty Ltd v. Maher [1998] 164 CLR 387 (**cit**)
- d Legislation referred to:**
Rules of the High Court 1980, O. 14

For the appellants/defendants - K Anantham (K Siva Kumar); M/s Skrine & Co
For the respondents/plaintiffs - Dato' VK Lingam (Pradeep Kumar); M/s Syarikat KL Rekhranj
- e**
Reported by Mariette Peters-Goh

JUDGMENT

Vincent Ng J:

- f Preamble**
Before me are:
- g**
(i) Enclosure 11 – the defendants' appeal against the decision of the learned Senior Assistant Registrar (SAR) on 10 January 2003, allowing the plaintiffs' application for summary judgment under O. 14 of the Rules of the High Court; and
- (ii) Enclosure 21 - the defendants' appeal against the decision of the learned SAR on 4 April 2003, dismissing the defendants' application for stay of the summary judgment pending the hearing of encl. 11.
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Judgment was entered for RM5,835,327.31 with interest at 8% per annum from 29 May 2002 till date of full settlement and costs.
- i**

Background facts

Quite simply, the facts of this case are as follows. The first defendant was awarded a government contract to construct a new army transit base for the Ministry of Defence personnel and staff (the government contract). The first defendant appointed TK-Yokohama Construction Sdn Bhd (TK Yokohama) as their sub-contractor to carry out the works under the government contract (the works contract), which award was duly accepted by TK-Yokohama.

Vide a tripartite novation agreement dated 20 October 1999 (exh. YPY3 encl. 4), between the first defendant (D1), the first plaintiff (P1) and TK-Yokohama, it was mutually agreed that TK-Yokohama be released from all their obligations as sub-contractor. In place of TK-Yokohama, P1 was appointed as sub-contractor to carry out all the works under the terms of the government contract.

Apart from this, P1 and second plaintiff (P2) entered into a joint-venture agreement dated 1 November 1999, wherein in consideration of providing the necessary finances, P2 was to have lead control in the performance of the works contract.

The second defendant (D2) entered the picture as D1's holding company. In this capacity, and claiming to be the main contractor, D2 opened an escrow account at Bank of Commerce Bhd, Shah Alam (the bank) and, vide a letter dated 1 July 1999, directed the bank to credit all payments received under this account directly to P2's bank account (exh. YPY 5 encl. 4).

The arrangement between the parties was that D2 would issue periodical certificates of payments, confirming the amount due and payable upon completion of certain works under the government contract. Pursuant to this arrangement, one such certificate was Certificate No: 11 dated 8 May 2001, for a sum of RM5,835,327.31 for works done as at 25 April 2001 (exh. YPY 6 encl. 4).

The defendants failed to pay the amount so certified, thereby terminating the contract. As a result of a subsequent joint site valuation of the extent of the works carried out after the issuance of Certificate No: 11, P2 caused to be issued Claim No: 12 (final claim) for a total sum of RM12,391,117.85 (exh. YPY 8 encl. 4). The plaintiffs have since, for the purposes of the summary judgment proceedings, withdrawn their claim for the balance of RM6,555,790.54 due under Claim No: 12.

Although the defendants raised five issues which they alleged were triable, for purposes of this appeal, I intend to address only two of them, which in my opinion, justify my decision.

a Issue No: 1 - No Privity Of Contract

From the pleadings, it is obvious that the primary parties to the works contract were P1, who was awarded the government contract, and D1 who by virtue of the novation agreement stepped into TK-Yokohama's shoes.

- b** It is important to note that the plaintiffs did not plead in the statement of claim (SOC) that there existed a contractual relationship between the plaintiffs and D2, and P2 and D1. The only pleaded claim is that D2 wrote the letter to the bank, authorising crediting into P2's account of proceeds received to the account of D2 from MBSB (para. 7 of SOC). Neither was it the pleaded case of the plaintiffs that privity was created by course of conduct. The following excerpt
- c** from my judgment in *Mahkota Technologies Sdn Bhd v. Bina Jati Sdn Bhd & Anor* (D1-22-3190-1998 – not submitted for publication) would be pertinent to this issue in the current case:

- d** That application before the Registrar and my decision to allow the appeal was grounded solely on the circumstance that the plaintiff's pleaded case does not show existence of any privity of contract between the plaintiff and the 2nd defendant. (See *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor (and Anor Appeal)* [1998] 3 CLJ 253 and *Yen Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 2 MLJ 240 at 242.) It is common ground that the 2nd defendant is the employer of the 1st defendant and the plaintiff is the sub-contractor employed by the 1st defendant. It is trite that such situation per
- e** se does not bring about or establish any actionable privity of contract between the 2nd defendant and the plaintiff (see Hudson's on *Building and Engineering Contracts* (11th Ed) page 1314).

- f** Mr Siau for the respondent/plaintiff readily conceded that there was no written agreement entered into between the plaintiff and the 2nd defendant, but he contended that privity between the two parties was established by conduct of the 2nd defendant and a series of 3 letters, exhibited as 'B-1' to 'B-3' in Enclosure 10. The plaintiff exhibited the letter of award (Exhibit 'A-3') in their Enclosure 22 which contained the words 'Payment on certificates duly certified by the consultants shall be made directly by our client, Sum-Projects
- g** (Brothers) Sdn Bhd', and this letter appeared to have been carbon copied to the 2nd defendant. I have however noted that even paragraph 10 of the plaintiff's statement of claim under caption 'Butir-Butir Perjanjian Kolateral' does not show any element of collateral contract being established. Upon close study of the pleadings I find that the gravamen of the 2nd defendant's complaint against the plaintiff is that it was never asserted or expressed
- h** anywhere in their pleadings that privity of contract had been established by the 2nd defendant's conduct. Unfortunately, this was not even pleaded in the alternative (see *Royden (M) Sdn Bhd v. Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd* [1992] 1 CLJ 503 at 39 and *Hampton v. Glamorgan County Council* [1917] AC 13). It is trite that a pleaded case cannot be changed or improved
- i** by affidavit. (As to the crucial importance of sufficient essential pleadings see

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667 SC; *Chartered Bank v. Yong Chan* [1974] 1 MLJ 157; *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196; *Farrel v. Secretary of State* [1980] 1 All ER 166; *Esso Petroleum Co Ltd v. Southport Corp* [1956] AC 218; *Muniandy & Anor v Muhamad Abdul Kader & Ors* [1989] 2 MLJ 416; *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 156.)

The common ground between the parties is that there was one payment on the works made by the 2nd defendant to the plaintiff, whereas the rest of the payments were made by the 1st defendant. Nevertheless, it is also trite that a payment arrangement, especially a single payment, does not create actionable privity even if sufficiently pleaded (not so pleaded in the current case).

P2 and D2's roles in the instant suit seem to stem solely from the joint-venture agreement between the two plaintiffs, to which neither one of the defendants had privity.

Clause 4(a) of the joint venture agreement provides as follows:

... all payments and or proceeds received from Bakti Kausar (D1) ... shall be paid directly ... into an ESCOW account of Bakti Kausar maintained with Bank of Commerce (M) Berhad and the Bank shall follow **a standing instruction to be issued by Bakti Kausar** to disburse the proceeds from the ESCROW account as follows:

- (i) ... shall be paid into another ESCROW account with the Bank operated jointly by PGL (P2) and Ribar (P1) ... (emphasis added)

The plaintiffs maintained that, by complying with this provision and giving the necessary instructions to the bank *vide* exh. 'YPY5' encl. 4, as D1's holding company, D2 was clothed with liability under the works contract. As authority for this proposition plaintiffs sought to invoke s. 94 of the Evidence Act 1950; which states that "when the language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts". Clearly, in my considered opinion, s. 94 is inapplicable as the document which counsel for the plaintiffs should focus on is the works contract between P1 and D1 rather than the letter dated 1 July 1999 (exh. 'YPY-5' encl. 4); in which case I would hold that s. 92 of the Evidence Act operates against the plaintiffs introducing an additional party to the works contract through the admission of extrinsic evidence to vary or contradict the works contract. See *UMBC Bhd v. Tan Lian Keng & Ors* [1990] 1 MLJ 280.

On the evidence before me, I am not satisfied that this is so. The whole focus of the joint-venture agreement entered into some two years after the works contract and independent of it, was to facilitate the money arrangements between

a the plaintiffs – for P2 to get a share of the profits in return for securing the necessary financing and for the disbursements of monies received from D1, and nothing more. Clearly, the court would need to know how D2 could become a party to a contract concluded several years earlier *ipso facto* by writing a letter to a third party, the Bank of Commerce (M) Bhd.

b The question of whether the acts of D2 following the joint-venture agreement were sufficient to give rise to privity of contract between the plaintiffs and D2, is in my opinion, a triable issue that ought to be determined at full trial.

Issue no: 2 – Certificate No: 11

c Clause 7 of the works contract is the governing provision for payments. The relevant portions are reproduced below for ease of reference.

7.0 – Conditions of Payment.

d Payment for the work shall be made progressively in line with the respective stages of work outlined hereunder:

i) Construction Work:

Payment for the construction works shall be made progressively subject always to the satisfactory performance of works ...

e *Claims of progress payment shall be certified by the Superintending Officer (SO) and the Project Director of MINDEF ...” (emphasis added)*

Not disputed is the fact that Certificate No: 11 (exh. YPY 6 encl. 4) did not bear the necessary certification in accordance with cl. 7.

f The plaintiffs maintained that this omission was of no consequence, firstly, because the letter of acceptance dated 21 August 1997 (exh. ‘YPY-2’ encl. 4) by TK-Yokohama had the effect of varying cl. 7.0 and secondly, because payments on Certificate Nos: 1 – 10 (exh. TA 2 encl. 6) were made in full despite not being certified by the SO and the Project Director of MINDEF.

g For this reason, the plaintiffs argued that the defendants are now estopped from denying that Certificate No: 11 was valid. In this regard, I have to be mindful that there was no specific averment in the SOC that the need for, or the mode of certification had been varied by exh. ‘YPY-2’ encl. 4. Consequently, as the plaintiffs’ assertion that cl. 7 had been varied was not borne out in their pleadings, their argument seems to be a proscribed attempt to improve on their pleadings. (See *UMBC v. Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206.)

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The defendants, on the other hand, sought to distinguish the first ten certificates on the grounds that although the certificates did not have the requisite certification, they had been signed by the Managing Director and Executive Director of the defendants whereas Certificate No. 11 was signed by only the Executive Director; and that the said certificates were paid in full in the form of advances made at their own discretion. And, this could in no way be construed as amounting to a waiver, such that would afford the plaintiffs' use of the doctrine of estoppel as a sword. At any rate, I find no facts or representation in the plaintiffs' pleaded case so as to enable reliance on estoppel, particularly when the plaintiffs in this case are seeking to use it as a 'sword' and not as a 'shield' – and especially as Certificate 11 by itself constituted a separate cause of action. (See *Walton Stores (Interstate) Pty Ltd v. Maher* [1998] 164 CLR 387.) I am also inclined to agree with the defendants for the further reason that, upon studying the relevant certificates, I found that all the certificates including Certificate No. 11 contain a rider 'Nilai dicadangkan untuk bayaran' (amount suggested for payment), which expression does not denote a conclusive or indisputable certificate demanding strict compliance. Thus, in my judgment, when the finality or the contents of periodical progress payment certificates are impugned with cogent reasons, it should be investigated at the trial. Similarly, this was the view I took, on certificates of practical completion, in *Mahkota Technologies Sdn Bhd* (formerly known as *The General Electric Co (M) Sdn Bhd*) v. *BS Civil Engineering Sdn Bhd* [2000] 7 CLJ 280. I would hold that whether such interim certificates could be challenged or subjected to the right of set-off would depend, in each case, upon the particular wording of the contract and the certificate itself – which should not always be regarded virtually as cash, a la a bill of exchange. See *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345. In the case at hand, I am satisfied that the defendants have advanced cogent grounds to impugn Certificate No. 11.

In *Gunung Bayu Sdn Bhd v. Syarikat Pembinaan Perlis Sdn Bhd* [1987] 2 MLJ 332, although the contract between the parties provided for the interim certificates to be issued by the architect, they were in fact issued by an unregistered graduate architect. Wan Suleiman SCJ, delivering the judgment for the then Supreme Court, found the question of whether the interim certificates were valid to be a triable issue and sufficient reason to set aside the summary judgment.

When a similar situation occurred in *Crown House Engineering v. Amec Projects* 48 BLR 32, the Court of Appeal held that:

There was no suggestion that there was an estoppel, and **it was plainly arguable that the figure of Pound Sterling 5,650,000 in the certificate could**

- a* not be regarded as a binding admission that this represented the value of the work if such value fell to be assessed on a quantum meruit basis in the absence of a contract ... (emphasis added)

I entirely agree with the judgment in the above two cases.

- b* In the present case, although the plaintiffs made much of the fact that D2 issued Certificate No: 11, the fact remains that D2 has challenged their being made a party to the works contract. This court's attention was also drawn to the fact that no letter of demand had been issued requiring payment on Certificate No. 11, and that the plaintiffs' SOC does not state that the certificate is due and payable at once – nor is any time frame for payment specified.
- c*

Conclusion

- d* At this stage of the proceedings, the absence of clear proof tying D2 to the works contract and the plaintiffs' evident non-compliance with the certification requirements under the same, raises triable issues in relation to the validity of Certificate No: 11 – upon which the plaintiffs' claim is founded. It is plainly arguable whether Certificate No. 11 could constitute a binding unqualified admission of debt, in the absence of, *inter alia*: (a) a contract involving D2; (b) the managing director's signature; and, (c) certification in accordance with the works contract between D1 and P1. Further, the issue also arises as to what would be the basis for judgment in favour of the plaintiffs, in particular, P1 against D1, a party who did not execute Certificate No. 11. My general observation is that the pleaded case is inconsistent or at odds with the case that the plaintiffs had sought to assert before me and the SAR. Perhaps, the plaintiffs should consider a reworking of their pleadings. Litigants are always circumscribed by their respective pleadings. And, no judge has ever attempted to depart from this trite rule of law – for otherwise, it would be impossible to control the direction or maintain the focus of evidence-taking.
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- g* On counsel Dato' VK Lingam's submission that a 'robust approach' ought to be taken in an O. 14 because a contractor will be deprived of its commercial lifeblood, it is to be noted that the case *Pembinaan Leow Tuck Chui & Sons Sdn Bhd (supra)* approved the principles in the House of Lords case of *Gilbert Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd (HL)* [1973] 3 All ER 195. In *Gilbert Ash*, Lord Diplock gave a short shrift to the argument that cash flow is the lifeblood of the building industry to justify a different approach to building contract disputes when he stated (at p. 215) as follows:
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My Lords, I accept the importance of 'cash flow' in the building industry. In the vivid phrase of Lord Denning MR: 'It is the very lifeblood of the enterprise' (71 L.G.R. 162, 167). But so it is of all commercial enterprises engaged in the business of selling goods or undertaking work or labour; ...

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‘Cash flow’ is the lifeblood of the village grocer too, though he may not need so large a transfusion from his customers as the shipbuilder in *Mondel v. Steel* or the sub-contractor in the instant appeal. It is also the lifeblood of the contractor whose own cash flow has been reduced by the expense to which he has been put by the sub-contractor’s breaches of contract. It is not to be supposed that so elementary an economic proposition as the need for cash flow in business enterprises escaped the attention of judges throughout the 130 years which had elapsed since *Mondel v. Steel and Dawnays*’ case (*Dawnays Ltd v. FG Minter Ltd* [1971] 2 All ER 1389) in 1971, or of the legislature itself when it passed the Sale of Goods Act in 1893.

After careful consideration of the pleadings, all 7 affidavits and the submissions put in by both sides and for the aforementioned reasons, I decided to allow the defendants’ appeal in encl. 11 with costs.

The defendants withdrew their second appeal which became redundant as the result of this decision, and accordingly, I struck off encl. 21 with no order as to costs.

In postscript, as the plaintiff has lodged an appeal to the Court of Appeal against my decision, I have for obvious reasons issued directions to the SAR to stay the fixing of the suit for case management for trial until the disposal of that appeal.

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